

RECOMMENDATIONS

COMMISSION RECOMMENDATION

of 12 December 2012

on the notification procedure provided for in Article 22(3) of Directive 2002/22/EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services

(Text with EEA relevance)

(2012/798/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Having regard to Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) ⁽¹⁾, and in particular Article 22(3) thereof,

Whereas:

- (1) A competitive market should help to provide end-users with a wide choice of content, applications and services and with the quality of service they require. National regulatory authorities should promote users' ability to access and distribute information and to run applications and services. National regulatory authorities, entrusted with the implementation of Article 22(3) of Directive 2002/22/EC, may set minimum quality of service requirements to be imposed on an undertaking or undertakings providing public communications networks in order to prevent degradation of service and the hindering or slowing down of traffic over networks. Proposed measures should be suitably justified and proportionate in relation to the objectives and regulatory principles set out in Article 8 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) ⁽²⁾. When proposing such measures, the national regulatory authorities should take account of the guidelines issued by the Body of European Regulators for Electronic Communications (BEREC) ⁽³⁾.
- (2) The Commission should assess any proposed measures, thus ensuring that the functioning of the internal market

is not adversely affected by the envisaged requirements. To that end, national regulatory authorities should provide the Commission with draft measures setting minimum quality of service requirements or amending previously imposed requirements under the procedure set forth in Article 22(3) of Directive 2002/22/EC. The notification mechanism should not involve any unnecessary administrative burden on the national regulatory authorities. Draft measures lifting any requirement previously imposed should at this stage only be notified for transparency purposes.

- (3) In order to enable the Commission to undertake its assessment, national regulatory authorities should provide it with their draft measures in good time before setting such requirements. This should be done by means of a notification summarising the grounds for action, the envisaged requirements and the proposed course of action. National regulatory authorities may discuss informally with the Commission their draft measures prior to notifying the Commission.
- (4) Certain minimum information concerning draft measures should be provided in order to allow the Commission to carry out an assessment. Account has to be taken of the need to ensure effective assessment, on the one hand, and to simplify administration as far as possible, on the other hand. To help simplify the assessment of notified draft measures and to make the process quicker, national regulatory authorities should use standard formats for notifications.
- (5) When the Commission makes comments or recommendations on proposed measures setting or amending minimum quality of service requirements, national regulatory authorities should take the utmost account of the Commission's comments or recommendations when deciding on the requirements. National regulatory authorities should also contribute to ensuring transparency by way of communicating the adopted measures, including those lifting previously imposed requirements.

⁽¹⁾ OJ L 108, 24.4.2002, p. 51.

⁽²⁾ OJ L 108, 24.4.2002, p. 33.

⁽³⁾ See BEREC, Guidelines for Quality of Service in the scope of Net Neutrality, BoR (12) 32.

(6) The Commission, for its part, should make publicly available the notification and all supporting information, as well as any comments or recommendations it has made or its notice on not having issued comments or recommendations. Where information is considered confidential by a national regulatory authority in accordance with EU and national rules on business confidentiality, the Commission and the national regulatory authority concerned should ensure such confidentiality in conformity with Article 5 of Directive 2002/21/EC,

HAS ADOPTED THIS RECOMMENDATION:

AIM AND SCOPE

1. The aim of this Recommendation is to ensure a coherent approach, full transparency and a streamlined procedure when national regulatory authorities intend to take measures setting minimum quality of service requirements pursuant to Article 22(3) of Directive 2002/22/EC.
2. To this end, national regulatory authorities should provide the Commission in good time with:
 - (a) draft measures setting minimum quality of service requirements pursuant to Article 22(3) of Directive 2002/22/EC;
 - (b) draft measures amending such previously imposed requirements;
 - (c) draft measures lifting any such requirement previously imposed.

DEFINITIONS

3. Terms defined in Directive 2002/21/EC, in Directive 2002/22/EC and in other specific directives have the same meaning when used in this Recommendation. In addition:

‘notification’ means the notification to the Commission by a national regulatory authority of a draft measure pursuant to Article 22(3) of Directive 2002/22/EC, accompanied by the notification form as provided in this Recommendation;

‘draft measures’ are any measures concerning quality of service requirements intended to prevent degradation of service and the hindering or slowing down of traffic over networks that a national regulatory authority proposes to impose on an undertaking or undertakings providing public communications networks.

NOTIFICATION PROCEDURE

4. Draft measures as referred to in point 2 should be made available to the Commission by means of the notification form set out in the Annex. The draft measures thus notified should include the following information, where applicable:
 - (a) a summary notification including:

- (i) the identity of the undertaking or undertakings providing public communications networks to which the draft measure applies;
- (ii) a summary of the grounds for action;
- (iii) the envisaged requirements to be imposed by the national regulatory authority;
- (iv) the proposed course of action;

(b) the national regulatory authority’s draft measure and all supporting documents, including:

- (i) the relevant facts and circumstances of the case at issue that give rise to the envisaged imposition of minimum quality of service requirements on an undertaking or undertakings providing public communications networks;
- (ii) an assessment of the proposed measure, in particular in view of the policy objectives and regulatory principles pursuant to Article 8 of Directive 2002/21/EC;
- (iii) the provisional time frame for implementing the minimum quality of service requirements;
- (iv) the specific methods that will be used to monitor the application of such requirements;
- (v) the results of any public consultation carried out by the national regulatory authority on the proposed measure; and
- (vi) the opinion issued by the national competition authority, where provided.

5. Notifications should be made by electronic means with a request for acknowledgement of receipt. Documents sent by electronic means will be presumed to have been received by the addressee on the day on which they were sent. Notifications will be registered in the order in which they are received.

6. Notifications will become effective on the date on which the Commission registers them (date of registration). Notice will be given on the Commission’s website and by electronic means to all national regulatory authorities and BEREC of the date of registration of a notification, the subject matter of the notification and any supporting documentation received, while ensuring confidentiality in conformity with Article 5 of Directive 2002/21/EC.

7. Notifications should be in an official language of the European Union. The notification form may be completed in an official language other than that of the draft measure. Any comments or recommendations adopted by the Commission pursuant to Article 22(3) of Directive 2002/22/EC will be in the language of the notified draft measure, translated where possible into the language used for the notification form.

8. Where requested by a national regulatory authority, the Commission will informally discuss a draft measure prior to notification.

9. A national regulatory authority may decide at any time to withdraw its notification, in which case the notified measure will be removed from the register and the national regulatory authority concerned, all other national regulatory authorities and BEREC will be informed. The Commission will publish a notice to that effect on its website.

TIMING AND FOLLOW-UP

10. In accordance with Article 22(3) of Directive 2002/22/EC, in particular when the Commission assesses a draft measure as referred to in point 2(a) or point 2(b), it may, having examined all the relevant information, make comments or recommendations on the draft measure, in particular when it considers that the proposed requirements would adversely affect the functioning of the internal market.

The examination period should not exceed two months following the notification of the draft measure unless otherwise agreed between the Commission and the national regulatory authority.

11. By way of derogation from point 10, within 15 days of notification of the draft measure:

- (i) the national regulatory authority or the Commission may seek to extend the examination period for a reasonable period of time, in particular because of the complexity of the assessment; or
- (ii) the national regulatory authority may seek to shorten the examination period where, in exceptional circumstances, it considers there is an urgent need to act, in order to safeguard competition and protect the interests of end-users.

When the national regulatory authority or the Commission seeks to extend or shorten the two-month examination period under (i) or (ii) above, it should state the reasons for doing so.

12. The length of potential derogations from the two-month examination period referred to in points 11(i) and 11(ii) should be subject to a prior agreement by the Commission and the national regulatory authority having regard, in particular, to the complexity of the assessment and the interest of the end-users and other stakeholders in having in place clear and predictable rules on quality of service. Where an extension is sought in accordance with point 11(i), the total examination period agreed should not exceed three months following notification of the draft measure.

By way of derogation from point 11, the Commission, following an initial review of a notified draft measure, may inform the national regulatory authority of a shortened examination period of one month.

13. Once a derogation from the two-month examination period as referred to in points 11 and 12 is agreed upon, the Commission will inform the national regulatory authority concerned, all other national regulatory authorities and BEREC, and it will publish a notice to that effect on its website specifying the length of the examination period agreed.

14. Without prejudice to points 11 and 12 above, following registration of a notification, the Commission, acting in accordance with Article 5(2) of Directive 2002/21/EC, may seek further information or clarification from the national regulatory authority concerned, specifying a deadline for the reply. The time frame of the notification procedure will be extended by the number of days passed until the reply to the request for information is received. National regulatory authorities should endeavour to provide in good time the information requested, where it is available.

15. Where the Commission makes comments or recommendations on proposed measures setting or amending minimum quality of service requirements in accordance with Article 22(3) of Directive 2002/22/EC, it will notify the national regulatory authority concerned by electronic means and publish such comments or recommendations on its website.

16. When the Commission has not issued comments or recommendations, it will inform the national regulatory authority concerned, all other national regulatory authorities and BEREC, and it will publish a notice to that effect on its website.

17. A national regulatory authority should not adopt any draft measure under point 2(a) or point 2(b) before the end of the examination period, established in accordance with points 10 to 12. Should the Commission not issue any comments or recommendations within the given notification time frame, the national regulatory authority may adopt the notified draft measure. Draft measures under point 2(c) may be adopted by the national regulatory authorities at any time after the notification.

18. Where a national regulatory authority adopts a measure pursuant to Article 22(3) of Directive 2002/22/EC, it should communicate the adopted measure to the Commission. The Commission will publish each adopted measure on its website, subject to rules on confidentiality in conformity with Article 5 of Directive 2002/21/EC.

ADDITIONAL PROVISIONS

19. In accordance with Regulation (EEC, Euratom) No 1182/71 of the Council ⁽¹⁾, any period of time referred to in this Recommendation will be calculated as follows:

- (a) where a period expressed in days, weeks or months is to be calculated from the moment at which an event occurs, the day during which that event occurs is not counted as falling within the period in question;
- (b) a period expressed in weeks or months ends with the expiry of whichever day in the last week or month is the same day of the week or falls on the same date as the day during which the event from which the period is to be calculated occurred. Where, in a period expressed in months the day on which it should expire does not occur in the last month, the period ends with the expiry of the last day of that month;
- (c) time periods include official holidays, Saturdays and Sundays;
- (d) working days mean all days other than official and/or public holidays, Saturdays and Sundays. Should a time

period end on a Saturday, Sunday or an official holiday, it will be extended until the end of the first following working day. The list of official holidays as determined by the Commission is published in the *Official Journal of the European Union* before the beginning of each year.

20. The Commission, together with the national regulatory authorities and BEREC, will monitor the application of the notification procedure. The Commission will evaluate the necessity of reviewing this Recommendation as appropriate two years after the date of its publication in the *Official Journal of the European Union*.

21. This Recommendation is addressed to the Member States.

Done at Brussels, 12 December 2012.

For the Commission

Neelie KROES

Vice-President

⁽¹⁾ OJ L 124, 8.6.1971, p. 1.

ANNEX

Notification form in respect of draft measures pursuant to Article 22(3) of Directive 2002/22/EC

INTRODUCTION

The notification form specifies the summary information to be provided by national regulatory authorities to the Commission when notifying draft measures in accordance with Article 22(3) of Directive 2002/22/EC.

The Commission intends to discuss issues relating to the implementation of Article 22(3) with national regulatory authorities, especially during pre-notification meetings. Accordingly, national regulatory authorities are encouraged to consult the Commission on any aspect of the notification form and in particular on the kind of information they are requested to supply or, conversely, the possibility of dispensing with the obligation to provide certain information in relation to measures imposing minimum quality of service requirements pursuant to Article 22(3) of Directive 2002/22/EC.

It is important to provide the Commission with a summary information including: (i) the identity of the undertaking or undertakings providing public communications networks subject to the draft measure; (ii) a summary of the grounds for action; (iii) the envisaged requirements to be imposed by the national regulatory authority; and (iv) the proposed course of action.

The national regulatory authority's draft measure, including adequate reasoning referring to the justification for and the proportionality of adopting the proposed measures in accordance with point 1 and point 2 of this Recommendation, should be attached to the notification form. The draft measure should include: (i) the relevant facts and circumstances of the particular case giving rise to the envisaged imposition of minimum quality of service requirements on an undertaking or undertakings providing public communications networks; (ii) an assessment of the proposed measure in view especially of the policy objectives and regulatory principles set out in Article 8 of Directive 2002/21/EC; (iii) the provisional time frame for implementing the minimum quality of service requirements and the specific methods that will be used to monitor the application of such requirements; (iv) the results of any prior public consultation carried out by the national regulatory authority; and (v) the opinion issued by the national competition authority, where provided.

SUMMARY INFORMATION

Describe briefly the content of the notified draft measure:	
Indicate the Article 22(3) notification reference of previously notified draft measures (if any):	
Identify the undertaking or undertakings on which this draft measure imposes obligations:	
Describe briefly the grounds for action:	
Describe briefly the envisaged requirements:	
Describe briefly the proposed course of action:	
Reference of the notified draft measure (with internet link if available):	